Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CLERK OF THE COURT
COMMISSIONER MYRA HARRIS K. Waldner
Deputy

GREATER GLENDALE FINANCE L L C SCOTT J MCWILLIAMS

v.

JAMES MUIGA NDEGWA (001) RICHARD BELLAH
SUSAN N MUIGA (001)

MANISTEE JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case No. CC2010030869RC

Defendants Appellants (Defendants) James Ndegwa and Susan Muiga, appeal the Manistee Justice Court's determination that they owed the balance of the debt for the purchase of their car. Defendants contend the trial court erred. For the reasons stated below, the court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On January 19, 2010, Plaintiff—Greater Glendale Finance, LLC—filed a summons and complaint alleging Defendants owed a debt based on a promissory note filed in connection with a retail installment and security agreement. Plaintiff requested the principal amount of $3,757.54 plus interest at the rate of 20.95 per cent per year. The Retail Installment Contract and Security Agreement (Agreement)[1] indicates the seller as Walker Motors, LLC, d.b.a. JD Byrider, and states the terms "we" and "us" refers to the sellers as well as its successors and assigns. The Agreement refers to the sale of a 2001 Mitsubishi Mirage and states the buyer gives the seller a security interest in the vehicle. The Agreement indicates a principal amount of $9,032.90 with a $3,636.92 finance charge, and interest at 20.95%. On page 2 of the Agreement, the contract is assigned to Walker Motors Financing LLC d.b.a. CNAC (CNAC) by Walker Motors LLC d.b.a. JD Byrider. Both the contract and the assignment provision are dated January 25, 2005.

[1] Retail Installment Contract and Security Agreement attached to Complaint.

Defendants filed an Answer alleging they owed no money to Plaintiff and asserting (1) they never contracted with Plaintiff; (2) any financial obligations arose out of the purchase of a used car; and (3) Defendants were informed the vehicle had been fully paid from insurance proceeds because CNAC—the successor to Walker Motors LLC—accepted payment from the third party insurer after the vehicle was totaled in a car accident in 2005.

Plaintiff—at varying times in the proceeding—asserted somewhat conflicting positions as to its status in the case. In Plaintiff's Response to Defendants' Motion To Dismiss, filed on February 22, 2011,—p. 2, ll. 6–12—Plaintiff asserted:

> Defendants claim in their Motion to Dismiss that the Contract was between Walker Motors Financing, LLC, [sic] d.b.a. CNAC, and Defendant James Ndegwa, and therefore Plaintiff has no contract with the Defendants. Defendants claim is mistaken and untrue as the Arizona Corporation Commission clearly states that Walker Motors Financing, LLC's corporation name is Greater Glendale Finance, LLC. Walker Motors Financing, LLC is one of the trade names under which Plaintiff operates and any contract with Walker Motors Financing, LLC, is also a contract with Plaintiff. Plaintiff is a party to the Contract and has the right to pursue all legal remedies. . . .

Thus, Plaintiff asserted it had a contract with Defendants. In contrast, in its Response and Objection to Defendants' Motion for Summary Judgment—p. 2, ll. 14–18—filed on April 25, 2011, Plaintiff asserts:

> JD Byrider is a different company than the Plaintiff and therefore Plaintiff is not even a party to the "contract for sale."

The Court held a trial on June 14, 2011. At trial—during Opening Statement—Defendants asserted there were two major issues in the case: (1) statute of limitations[2] because Defendant claimed Plaintiff filed the action more than four years after their final payment and this was a breach of a sales contract;[3] and (2) reliance.[4]

Rodney Guilford testified on Plaintiff's behalf as an employee of Glendale Greater Finance[5] formerly known as Walker Motors Financing. Mr. Guilford stated the business went through a name change but otherwise remained the same.[6] Plaintiff introduced a copy of the contract Defendant signed.[7] The contract is titled Retail Installment Contract and Security Agreement.[8] Mr. Guilford stated the contract was a "standard, state-conformed issued sales contract and

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[2] Audio recording, bench trial of June 14, 2011 T 8:27–30.
[3] *Id*. at 8:35:58:–8:36:05.
[4] *Id*. at 8:36:06–07.
[5] *Id*. at 8:36:53.
[6] *Id*. at 8:37:11–35.
[7] Plaintiff's Exhibit 1.
[8] Audio transcript, *id*. at 8:39:01.

financing agreement."[9] Mr. Guilford then said the contract was a "two-fold agreement."[10] Walker Motors Financing LLC was the original lender.[11] Mr. Guilford stated Walker Motors Financing LLC lent Defendant the money to buy the vehicle which—in turn—was paid to Walker Motors LLC.[12] He testified the Plaintiff took a lien to secure the loan[13] but Walker Motors Financing LLC never owned the vehicle and never had title to it.[14]

Plaintiff spoke about a CD that purported to reflect the signing of the agreement. This CD was not provided to this Court and was not played during the trial. Instead, Mr. Guilford testified about the CD's contents and stated the CD showed (1) Defendant asked questions while he was signing the contract and (2) Defendant was given information reflecting there was a separate company financing the car as opposed to selling the car.[15] Mr. Guilford said the CD also showed that Defendant indicated he understood the difference between the two companies.[16] According to Mr. Guilford, Defendant was told (1) there was no gap insurance and (2) that Greater Glendale Financing—and its predecessor—did not provide any type of gap insurance.[17] In addition,—according to Mr. Guilford—Greater Glendale Financing's file for Defendant has no information about any gap insurance for Defendant.[18]

Mr. Guilford identified Plaintiff's Exhibit #3 as an accurate ledger sheet reflecting the payments Defendant made on the loan.[19] Mr. Guilford testified the Defendant's payments stopped on July 22, 2005,[20] after there was an accident and Greater Glendale received an insurance payment from Defendant's insurer.[21] The insurance payment did not cover the entire remaining loan balance at the time of the accident.[22] The remaining balance was $3,267.54[23] with interest accruing at the rate of 20.95%.[24] Mr. Guilford testified Defendant agreed to pay court costs and attorney fees[25] but the trial court was not able to find an attorney's fee provision in the contract.[26]

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9 *Id*. at 8:39:49–56.
10 *Id.* at 8:39:58.
11 *Id*. at 8:41:06–8:41:16.
12 *Id*. at 8:42:44.
13 *Id*. at 8:42:53–55.
14 *Id*. at 8:43:13.
15 *Id*. at 8:49:14.
16 *Id*. at 8:49:24.
17 *Id*. at 8:49:49.
18 *Id*. at 8:50:01.
19 *Id*. at 8:50:29.
20 *Id*. at 8:51:18.
21 *Id*. at 8:51:28.
22 *Id*. at 8:51:35.
23 *Id*. at 8:51:51.
24 *Id*. at 8:51:58.
25 *Id*. at 8:54:23.
26 *Id*. at 8:55:04.

Mr. Guilford stated Greater Glendale Financial never released Defendant from his obligation to pay under the contract.[27] He maintained the suit against Defendant was for the deficiency and that Greater Glendale Financial had not received any payment after the insurance payment.[28]

On cross examination Mr. Guilford said he was an officer of the LLC[29] but that he does not meet with customers purchasing vehicles and did not meet with Defendant.[30] After reading the provision about Sale, Mr. Guilford admitted the contract was a contract for the sale of a vehicle.[31] He then clarified this statement to say the sales portion applied to Walker Motors LLC but the financing applied to a separate company—Walker Motors Financing—the predecessor of Greater Glendale Financial, LLC.[32]

Defendant then testified about the vehicle purchase and agreed he signed the contract.[33]

Defendant stated the vehicle was in an accident and the other party was at fault.[34] He stated he went to the dealership immediately after the accident occurred[35] and spoke with a manager—Mr. DiLazarro—about what happened to the vehicle.[36] Defendant had prior dealings with this manager when he purchased the car.[37]

After the accident, Defendant purchased a vehicle from Enterprise Car Sales.[38] At that time, Defendant was asked to provide a credit history.[39] Defendant testified he gave Enterprise information about his prior car purchase. Defendant then referred to his Exhibit 1.[40] This is a copy of a fax together with a cover sheet and a copy of a business card.[41] Defendant attempted to introduce this document but Plaintiff objected to it[42] as hearsay.[43] Defendant stated he obtained this document from Enterprise Car in 2006. Defendant stated John DiLazarro was the manager at

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[27] *Id*. at 8:56:05.
[28] *Id*. at 8:56:34.
[29] *Id*. at 8:58:01.
[30] *Id*. at 8:58:49.
[31] *Id.* at 8:59:23–8:59:50.
[32] *Id*. at 9:00:32–44.
[33] *Id*. at 9:02:17.
[34] *Id*. at 9:02:44.
[35] *Id.* at 9:02:47–53.
[36] *Id*. at 9:03:17.
[37] *Id*. at 9:03:23–57 and 9:11:11.
[38] *Id*. at 9:04:23.
[39] *Id.* at 9:05:08.
[40] Id. at 9:06:27.
[41] *Id.* at 9:06:30–9:09:25.
[42] *Id*. at 9:06:48–49.
[43] Plaintiff referenced this document in "Plaintiff's Response to Defendants' Motion to Dismiss filed on February 22, 2011.

CNAC[44]—the d.b.a. for Walker Motors Financing. Defendant testified that when he spoke with Mr. DiLazarro after the accident, they spoke about the remaining balance on the vehicle.[45] Defendant then asserted that—based on this conversation—he believed the car would be paid off and made no further payments on the car.[46]

Defendant said he went to Enterprise to look for this document because he knew the document existed.[47] Defendant again attempted to introduce his Exhibit 1 and claimed the document was self-proving as a faxed document because it carried the date and time it was sent. Plaintiff objected and the trial court determined the document was inadmissible as hearsay.[48] Later, on cross-examination, Defendant admitted to his signature on the contract[49] and also stated the ledger reflects the payments he made.[50]

In ruling, the trial court determined the 6 year statute of limitations applied instead of the 4 year statute[51] and determined the trial court was not convinced by Defendant's argument about accord and satisfaction and/or novation. The Court instructed Plaintiff to create a China Doll affidavit. On June 22, 2011, the trial court signed a judgment awarding Plaintiff judgment for the principal amount of $3,167.54; interest of $3,963.01 from July 22, 2005, through June 14, 2011; attorney's fees of $2,000.00; and costs of $513.24.

Defendant filed a timely appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Parties Properly Present Their Issues On Appeal.

Defendant and Plaintiff have submitted memoranda on appeal, but neither party appropriately and specifically referenced the record in the submitted memoranda. Therefore, both appellate memoranda fail to comply with Rule 8(a)(3), Super. Ct. R. App. P.—Civil, which states:

> Memoranda shall include a short statement of the facts with reference to the record, a concise argument setting forth the legal issues presented with citation of authority, and a conclusion stating the precise remedy sought on appeal.

For this reason, the Court finds the Defendant and the Plaintiff failed to properly present the issues for appeal.

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44 Audio, transcript, *id*. at 9:10:17.
45 *Id*. at 9:11:46.
46 *Id*. at 9:11:52–9:12:45.
47 *Id*. at 9:13:01.
48 *Id*. at 9:14:21–9:14:51.
49 *Id*. at 9:15:51.
50 *Id*. at 9:16:01.
51 *Id*. at 9:20:36.

B. Did The Trial Court Err In Determining The Contract Was A Contract For A Debt As Opposed To A Contract For The Sale Of Goods

The first and primary issue in this case is whether (1) the contract Defendant Ndegwa signed is a contract for the sale of goods, governed by the U.C.C.—A.R.S. § 47–2106 (A)—or (2) if the contract is a financing contract for a debt. Neither party provides much in the way of analysis of the contract. Neither party provides precedent to guide this Court. Instead, each side asserts its position which is summarized as follows:

(1) The Plaintiff maintains the agreement between Defendant and Plaintiff's predecessor in interest is a financing agreement wherein Defendant promised to pay a sum certain. Plaintiff contends the contract did not pass title as Plaintiff did not have any ownership in the motor vehicle to sell. Plaintiff alleges in its responsive memorandum—p.4, ll. 9–16—that the sales contract is between the "seller JD Byrider" and Defendants and asserts Plaintiff is a different company which provided the financing.

(2) Defendants assert the contract is a contract for the sale of goods—the automobile—which created a security interest in the vehicle. Defendants maintain the contract is governed by the U.C.C. Defendants assert that Plaintiff—as an assignee and successor to the contract—is bound by the terms of the sales agreement.

The language of page 1 of the agreement supports Defendants' position. The Agreement is a form agreement titled "Retail Installment Contract and Security Agreement." At the top, the parties are listed as "Seller" and "Buyer". The contract's terms specify the meaning of the words "we" and "us" mean "the Seller above, its successors and assigns."

What is less clear, however, is what parties are to be bound by the contract. On page 2 of the contract, the seller's signature is illegible. No entity or name is typed beneath the signature. Page 2 of the contract also has a specific assignment provision whereby the seller, Walker Motors LLC d.b.a. JD Byrider, assigned the contract and security agreement to Walker Motors Financing LLC d.b.a. CNAC.

Plaintiff asserted this contract was a bi-partite agreement with one portion reflecting the sale of the auto and a separate portion reflecting the financing terms. Page 2 of the Agreement—Assignment—in relevant part reflects the following:

> This Contract and Security Agreement is assigned to Walker Motors Financing LLC d.b.a. CNAC, the assignee, phone 623-435-5200. This assignment is made under the terms of a separate agreement.
>
> Seller: By Walker Motors LLC d.b.a. JD Byrider.

This language appears to definitely assign the contract to Walker Motors Financing LLC d.b.a. CNAC, Plaintiff's predecessor. As an assignee, Plaintiff is a successor,[52] and is governed by the terms of the Agreement. Additionally, because Plaintiff argued it was governed by the Agreement in a prior motion in this case, Plaintiff cannot now assert a contrary position. In *Bank of American National Trust & Savings Association v. Maricopa County*, 196 Ariz. 173, 993 P.2d 1137 ¶ 7 (Ct. App. 1999) the Court of Appeals discussed the concept of judicial estoppel. The Court of Appeals stated the purpose of judicial estoppel is to "protect the integrity of the judicial system by 'prevent[ing] a party from taking an inconsistent position in successive or separate actions." While the judicial estoppel doctrine refers to successive cases, this Court believes the rationale applies when the inconsistent statements are made in the same case. Here, Plaintiff alleges it is both governed by the Agreement and not governed by the Agreement. Plaintiff has not provided any explanation for this inconsistency. The Court of Appeals set forth three factors to consider for judicial estoppel to be met in *Bank of American National Trust & Savings Association v. Maricopa County*, *id.*, 196 Ariz. 173, 993 P.2d 1137 ¶ 7. These factors are: (1) the parties must be the same; (2) the question involved must be the same: (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding. Here, these three factors are essentially met: (1) the parties are the same; (2) the question is the same; and (3) Plaintiff was successful in that Defendants were denied their Motion to Dismiss. Although the Court of Appeals did not find that prevailing on a motion to voluntarily dismiss a complaint was success in *Bank of American National Trust & Savings Association v. Maricopa County*, *id.*, this Court believes the underlying reasoning for estoppel applies when a party to a case takes contrary factual positions in its assertions to the court. Stated simply, Plaintiff cannot assert it is a party to the Agreement and the contrary position—it is not a party to the Agreement—in the same case.

The contract is primarily a contract for the sale of a good—the automobile. The first paragraph of the Agreement reads:

> **Sale**: You agree to purchase from us, on a time basis, subject to the terms and conditions of this contract and security agreement (Contract) the Motor Vehicle (Vehicle) and services described below. The Vehicle is sold in its present condition, together with the usual accessories and attachments.

The Agreement also includes the following language about security.

> **Security**: You are giving a security interest in the Motor Vehicle purchased.

Under Arizona law, there is a difference between a contract and a contract for sale. The terms "contract" and "agreement" are defined in A.R.S. 1–201 (b) (3) and (b) (12) as follows:

[52] In Plaintiff's Response to Defendants' Motion To Dismiss, filed on February 22, 2011,—p.2, ll. 6–12— Plaintiff states: "the Arizona Corporation Commission clearly states that Walker Motors Financing, LLC's corporation name is Greater Glendale Finance, LLC. Walker Motors Financing, LLC is one of the trade names under which Plaintiff operates and any contract with Walker Motors Financing, LLC, is also a contract with Plaintiff."

> 3. “Agreement,” as distinguished from “contract,” means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing or usage of trade as provided in § 47–1303.
>
> 12. “Contract, as distinguished from “agreement,” means the total legal obligation that results from the parties’ agreement as determined by this title as supplemented by any other applicable laws.

The notes appended to the statute indicate the terms “Agreement” as used in the Uniform Commercial Code is intended to

> . . . include full recognition of usage of trade, course of dealing, course of performance and the surrounding circumstances as effective parts thereof, and of any agreement permitted under the provision of the Uniform Commercial Code to displace a stated rule of law. Whether an agreement has legal consequences is determined by applicable provisions of the Uniform Commercial Code and, to the extent provided in Section 1–103, by the law of contracts.

A contract for sale is specifically defined by the Uniform Commercial Code (U.C.C.), A.R.S. § 47–2106 (A) which states:

> In this chapter, unless the context otherwise requires, “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (§ 47–2401).

The Agreement between the parties specifies the sale of the automobile. It also specifically mentions the creation of a security interest. Clearly the contract is a contract for sale and that section of the Agreement is governed by the U.C.C.

Plaintiff contends the financing portion of the Agreement refers to the creation of a debt and the portion about financing must be subject to the more general 6 year statute of limitations referring to a debt. Plaintiff provides no support for this position aside from its bald assertion the contract was a contract for a debt and Plaintiff did not have an ownership interest to sell. While Plaintiff may have lacked an ownership interest, Plaintiff disregards the language of the contract wherein the seller is listed as Walker Motors LLC d.b.a. JD Byrider and not as Plaintiff’s prior company Walker Motors Financing LLC.

This Court acknowledges this may be an ambiguous contract. However, ambiguous contracts are construed against the drafter of the contract, *United California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 260, 681 P.2d 390, 412 (Ct. App. 1983); *Taylor v. State Farm Mutual Automobile Insurance Company*, 175 Ariz. 148, 158–59, 854 P.2d 1134, 1144–45 (1993) and is a legal question for the courts. Arizona law is clear that—to the extent the contract is ambiguous—the contract would be construed against the drafter—the Plaintiff. Here, the title of the contract —Retail Installment Contract—and the numerous references to the sale of the car supports Defendant.

Case law further supports Defendant's position that the sale of the automobile is a retail sales agreement subject to the provisions of the U.C.C. In *Broadmont Corporation v. Fashion Floors, Inc*., 124 Ariz. 282, 603 P.2d 553 (Ct. App. 1979) the Court of Appeals found the sale of repossessed vehicles—followed by a suit for a deficiency judgment—was held under the U.C.C. While Arizona does not have case law specifically dealing with the situation before this Court, other states do.

In *DaimlerChrysler Services North America, LLC v. Ouimette,* 175 Vt. 316, 830 A.2d 38, (Vt. 2003) the Supreme Court of Vermont discussed a deficiency suit following a default on a retail motor vehicle installment sales contract and determined the contract was (1) governed by the U.C.C. and (2) subject to the 4 year statute of limitations period in Article 2. The case includes an extensive listing of jurisdictions which follow this rule. In addition, the Vermont Supreme Court found the New Jersey Supreme Court decision in *Associates Discount Corp. v. Palmer,* 47 N.J. 183, 219 A.2d 858, 860–61 (1966), to be persuasive, and followed New Jersey's lead in ruling "a retail installment sales contract, as a hybrid sales-security agreement, was not intended to operate 'only' as a security transaction, and therefore Article 2 applied." *DaimlerChrysler Services North America, LLC v. Ouimette, id.,* 175 Vt. at ¶ 9. The *DaimlerChrysler Services North America, LLC v. Ouimette*, *id.*, case parallels our own. In *DaimlerChrysler Services North America LLC, id.*, there was a sale of a vehicle as well as a simultaneous assignment of the dealership's rights to the predecessor of the financing company. The court found (1) there was a direct buyer-seller relationship between the defendant and the dealership and (2) the relationship primarily arose from the sale of goods. The court further found the Plaintiff—as an assignee of the contract—stood in the shoes of the seller and, therefore, the statute of limitations for the sale of goods applied to the contract.

In *Scott v. Ford Motor Credit Company*, 345 Md. 251, 691 A.2d 1320 (Ct. App. Md. 1997) the Maryland Court of Appeals ruled on a case where the buyer signed a retail installment contract for the sale of a vehicle. After the car was damaged in an accident, the costs of repair exceeded its value and the vehicle was repossessed and sold. The holder of the note sued for a deficiency judgment. In deciding this action, the Maryland court—like the Vermont court—determined that a hybrid agreement including both a contract for sale and a secured transaction is governed by Article 2 of the U.C.C.

The majority of states follow the U.C.C. on issues of automobile sales with retail sales agreements and purchase money security interests. Because (1) this case involves a purchase money security interest arising from the sale of an automobile and (2) the Plaintiff stands in the shoes of the original seller, this Court finds the action is governed by the U.C.C. and is not a debt under contract law.

. . . . .

C. Did The Statute Of Limitations Expire.

The car accident occurred in July, 2005. In its Complaint, Plaintiff alleged Defendant ceased making payments on July 22, 2005. Under the Arizona U.C.C.—A.R.S. § 47–2725 (A)—the statute of limitations for an action for breach of contract for sale is four years after the cause of action occurs. The statute of limitations expired on July 22, 2009. Plaintiff, however, did not file suit until January 19, 2010. Therefore their suit was untimely and was barred by the statute of limitations.

D. Did The Trial Court Err In Refusing To Admit The Faxed Letter Because of Lack of Foundation and Hearsay Problems

Because this Court has determined the Statute of Limitations expired, this Court does not need to address the remaining issues about admission of the faxed letter as this issue is now moot.

III. CONCLUSION.

Based on the foregoing, this Court concludes the Manistee Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the Manistee Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Manistee Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 011720121400